United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1420

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

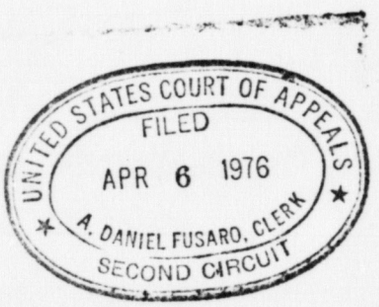
Docket No.

SAMUEL SNOW,

75-CR-82

Appellant.

APPELLANT'S BRIEF



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PRELIMINARY STATEMENT

The appellant, Samuel Snow, was indicted by the Grand Jury of the Northern District and charged with one count that the appellant, with Glen A. Snow, conspired to commit an offense against the United States, to wit: to violate Title 21 U.S.C. Section 841 (A) Subd. 1. The appellant was tried with Glen A. Snow at Syracuse, New York, and was convicted after a jury trial of the charges set forth in the indictment and sentenced to three years probation. The appeal is timely taken.

STATEMENT OF CASE

The appellant was indicted and received a one-page indictment containing four overt acts. The appellant was arraigned on the said indictment before the Hon. James T. Foley at Albany, New York. At the time of this arraignment, a motion date was set by the Court and a motion was made by Glen A. Snow's counsel and the motion was to apply to the appellant. On the return date of the motion the government reaffirmed the four overt acts and set forth an additional overt act concerning an April 10, 1975, trip to New York City. The government in its reply to the defendants' motion assumed an obligation to provide continuing information concerning future overt acts. (See page 14.) A review of the government's indictment and the answering affidavit of

August 22, 1975, shows that the government's theory at that time was that the two defendants conspired to violate the laws of the United States. Subsequently, the government permitted defense counsel to listen to certain recordings of conversation between Glen Snow and Agent Mangor. The matter was called for trial and the appellant appeared before the Hon. Lloyd F. MacMahon at Syracuse for trial. The appellant's counsel was given the 3500 material and heard the government's "story of the crime" in the opening statement. At this time the government's theory was a two-man conspiracy consisting of five overt acts.

During the trial the government's informant, after being granted full immunity, testified as to certain overt acts which occurred subsequent to April 10, 1975. The overt acts were not contained within the bill of particulars nor did the government offer this information to the appellant's counsel prior to its being presented. The Court, over the defense counsel's objection, permitted the overt acts not contained in the bill of particulars to be admitted into Court. At this stage of the proceeding the government shifted its theory in showing other persons unknown at the time of the indictment to be participating in this over-all conspiracy and the government changed the status of the informant to that of co-conspirator by the showing of a sale to his fellow employee.

After summation, the Court, mindful of the fact that the government had failed to show either with direct evidence

or circumstantial evidence that Samuel Snow or Glen Snow entered into an agreement to conspire to violate the laws of the United States, instructed the jury in such a manner as to vary the indictment with the proof. The Court by its instruction created a new conspiracy.

STATEMENT OF FACTS

During the latter part of March and early April, 1975, the informant, Jules Votraw, made a deal with Agents Mangor and Fitzpatrick concerning his cooperation in certain government investigations involving drugs in Essex and Clinton Counties of the Northern District of New York. The informant, who had previously had difficulty with the law, agreed to this cooperation and set a meeting up in AuSable Forks, New York. The meeting was set up by informant Votraw who told Samuel Snow that he and his cousin, Paul, wanted to talk to Glen Snow. Later that evening Glen Snow was alleged to have had a conversation with Agent Mangor at Meconi's Bar in AuSable Forks. That same evening a similar conversation was alleged to have been had between Samuel Snow and Agent Mangor.

Later on certain telephonic communications were had between Glen Snow and Agent Mangor and there was a later transfer of some two hundred dollars which was supposed to be used for the purchase of half an ounce of cocaine. Glen Snow was alleged to have borrowed certain money from the National Commercial Bank and Trust Company for the purpose

of financing this drug transaction and then a trip was made to New York City.

The testimony on the part of the informant was that prior to arriving in New York City, Glen Snow gave back the two hundred dollars that was obtained from the agent and then the informant testified that certain cocaine was purchased and that there was tasting and cutting of the drug in the Riverside Drive apartment in New York City and that the informant, Glen Snow and Samuel Snow returned to Brewster, New York, at which time the informant took the drugs and sold them to a fellow employee.

There were a number of telephone conversations between Glen Snow and Agent Mangor. Only one telephone conversation involved Samuel Snow and it was nothing more than a greeting.

Subsequently Agent Mangor testified that he had a conversation with Glen Snow concerning the availability of future drugs for him. Later on Samuel Snow informed Agent Mangor that he could obtain certain cocaine if he would front the venture with approximately six hundred fifty dollars. Samuel Snow, mindful of the fact that Agent Mangor was an undercover agent, took the six hundred fifty dollars without any intention of buying any drugs or doing anything except take Agent Mangor's money.

PRELIMINARY ISSUES

1. Was the appellant given a fair trial before the Hon. Lloyd F. MacMahon? No.

2. Did the Court err in permitting the testimony concerning overt acts not in the bill of particulars? Yes.

3. Did the Court's participation and comments render it impossible to obtain a fair trial? Yes.

4. Did the Court's tyranny of appellant's counsel violate his Sixth Amendment rights of effective assistance of counsel? Yes.

5. Did the Court err in not granting judgment at the end of the prima facie case? Yes.

6. Did the Court err in not giving the proper instructions consistent with the indictment? Yes.

7. Did the Court err in not granting the appellant's motion to arrest the judgment? Yes.

8. Did the Court make prejudicial remarks which rendered a fair and impartial trial impossible? Yes.

POINT I

THE COURT ERRED IN PERMITTING TESTIMONY AS TO OVERT ACTS NOT CONTAINED IN THE BILL OF PARTICULARS.

A joint motion was made for a bill of particulars. This motion was responded to by the Assistant U.S. Attorney in that he reaffirmed the four overt acts which were made a part of the indictment and added an additional overt act which was dated April 10, 1975. The government permitted the appellant's counsel to listen to the recorded telephonic conversation between Agent Mangor and Glen Snow. The affidavit in response to the bill of particulars clearly outlined the theory of the government involving the two defendants as the co-conspirators and it was set forth in the affidavit.

The response to the bill of particulars shows that "the government will provide the requested information for any other overt acts, which may become known to the government about which the government may introduce evidence at trial..." The commitment by the U.S. Attorney's Office to give continuing bills of particulars concerning the overt acts was a commitment relied upon by defense counsel in their preparation for the defense of this matter. The case law is clear as to what the government must or more not give concerning the bill of particulars in a conspiracy case and it would appear that certain demands in that bill of

particulars were not proper subjects of a bill of particulars. U.S. v. Salazar 485 Fed. 2d 1272; U.S. v. Callahan 300 Fed. Supp. 519; U.S. v. Kelly 254 Fed. Supp. 9; U.S. v. Agnello 367 Fed. Supp. 444.

The government made commitment by its Assistant U.S. Attorney to furnish continuing details involving additional overt acts that came to the attention of the government. All the acts testified to after April 10, 1975, were in violation of that agreement and the Court should have struck those details which appeared to be the facts which showed or connected defendants, Samuel Snow and Glen Snow, to the conspiracy. The five overt acts contained in the pleadings as a matter of law did not make out an agreement either directly or indirectly. The Court erred in permitting that evidence to be before the jury. The introduction of such evidence is error and the conviction of the appellant should be reversed and the indictment dismissed.

POINT II

APPELLANT, SAMUEL SNOW, WAS NOT GUARANTEED A FAIR TRIAL.

A review of the record shows that the Hon. Lloyd F. MacMahon criticized and commented on the performance of the defense counsel before the jury and he participated not only in the direct but the cross examination of witnesses. Judge MacMahon, an exerpienced trial lawyer and jurist, took over the essential questioning that connected facts together in the case. The Court's appearance and participation in the fact-making process deprived the appellant of a fair trial. The excessive participation and comments on the part of the Court in a case where the evidence against the appellant was slight, in all probability was the factor that caused the conviction of the appellant. Holmes v. U.S. 271 Fed. 2d 63; U.S. v. Gulielmini 384 Fed. 2d 602; U.S. v. Persico 305 Fed. 2d 534; U.S. v. DeSicto 289 Fed. 2d 833.

The Sixth Amendment of the United States Constitution guarantees that a defendant will be assured of effective assistance of counsel. The Court acts as a monitor in the trial process and is the one who has an ultimate obligation in insuring that the defendant is given a full and fair trial. A part of that fair trial is to insure that counsel is adequate and effective. The threats and the criticisms by the Court and the power of contempt under 18 U.S.C. Section 401

have the effect of forcing counsel to defend himself opposed to defending the defendant. The record speaks for itself.

The conviction of the appellant must be reversed on the grounds that he was not granted a full and fair trial.

POINT III

THE COURT ERRED IN NOT GRANTING A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE.

The motion for a judgment of acquittal was made and was denied.

15 A Corpus Juris Secundum Section 1 et. seq. provides that a criminal conspiracy is:

a) an object which is to be accomplished;

b) a plan or scheme embodying a means of accomplishing the object;

c) an agreement or understanding between two or more persons whereby they become definitely committed to cooperating for the accomplishment of the object by the means embodied in the agreement or by any effectual means.

The following are just a few of the numerous cases which set forth essential elements of a criminal conspiracy: U.S. v. Hester 465 Fed. 2d 1125; U.S. v. Hysohion 448 Fed. 2d 343; U.S. v. Armoncida 515 Fed. 2d 29; U.S. v. James 510 Fed. 2d 546; U.S. v. Sperling 506 Fed. 2d 1323.

Justice Learned Hand said in U.S. v. Falcone 109 Fed. 2d 579, 581, that in order for a man to be held to have joined others in a conspiracy "he must in some sense promote their venture himself, make it his own, have a stake in the outcome." The proof in a conspiracy case, which is not clear and is disconnected and different from that specifically charged, is not enough to sustain a conviction. Ingram v. U.S. 360 U.S. 672; U.S. v. Ferber 425 Fed. 2d 107; U.S. v. Puco 436 Fed. 2d 761. In order to apply statements made out of the presence of the defendant to connect him to the conspiracy, there must be convicing proof of the existence of the conspiracy. Glasser v. U.S. 315 U.S. 60. Mere conversation between the co-conspirators is not admissible as being the connecting force to the agreement of the conspiracy. U.S. v. Birnbaum 337 Fed. 2d 490. The mere association with one who is about to commit a crime is not enough to sustain a guilty verdict against the associate. There must be a prima facie showing that the defendant was involved in and participated in the conspiracy. U.S. v. Tyler 505 Fed. 2d 1329; U.S. v. Martinez 486 Fed. 2d 15; Panci v. U.S. 256 Fed. 2d 308; U.S. v. Arroyave 477 Fed. 2d 157.

The facts in the instant case show that the appellant was nothing more than an associate and was not part of the conspiracy. He was along for the ride. A review of the testimony shows the following:

1) Agent Mangor in the presence of Jules Votraw had a conversation concerning a possible transaction concerning some cocaine.

2) Agent Mangor out of the presence of Glen Snow had a conversation with Samuel Snow concerning a cocaine transaction.

3) Glen Snow borrowed some money from the National Commercial Bank allegedly for the purchase of the drugs.

4) Glen Snow obtained an advance of two hundred dollars from Agent Mangor.

5) Glen Snow and Samuel Snow made a trip to Brewster, New York, at which time Glen Snow was informed that Agent Mangor was an undercover agent. At that time the money that was advanced was given back to Jules Votraw. Samuel Snow was present in the back seat of Glen Snow's car.

6) Votraw, Glen Snow and Samuel Snow were allegedly to have gone to certain people's apartment in New York City where a purchase of cocaine was consumated.

7) Three of them returned to Brewster, New York. Later that morning, Jules Votraw sold the cocaine to a fellow employee.

8) A telephone conversation between Glen Snow and Agent Mangor takes place concerning his failure to obtain the drugs. At this point Samuel Snow speaks to Agent Mangor by phone and merely greets him.

9) The subsequent conversation was had between Glen Snow and Agent Mangor at the Plattsburgh Air Force Base.

10) A conversation was had between Samuel Snow and

Agent Mangor that he, Samuel Snow, would purchase certain cocaine for six hundred fifty dollars.

These facts show no essential elements of a conspiracy to convict either of the defendants. It is clear that the agreement between Glen Snow and Agent Mangor is separate and independent from that of any conversation had by Samuel Snow. As the government informant testified, he was not sure that Samuel Snow was even capable of having a conversation the night in Meconi's bar. The conspiracy ended before the overt act in furtherance of the conspiracy was completed. The taking of the six hundred fifty dollars from Agent Mangor by Samuel Snow is certainly not a part of the over-all conspiracy.

The Court erred in permitting this case to go to the jury. The Court should have granted a judgment of acquittal based upon the fact that there was no proof of Samuel Snow's participation in the conspiracy which terminated in Brewster, New York. The conviction against the appellant should be reversed and the indictment dismissed.

POINT IV

THE COURT ERRED IN NOT GRANTING THE ARREST OF JUDGMENT.

The Court in its instructions spoke of a multiple conspiracy which varied from the indictment and the necessary proof. The Court's instruction, though not objected to at the time it was given, was plain error and should have resulted in the setting aside of the verdict against the appellant. As is set out in the motion to arrest judgment on pages 422 to 424 of the record, there is a showing of a multiple conspiracy opposed to the single conspiracy charged in the indictment. U.S. v. Irzzo 491 Fed. 2d 1235; U.S. v. DeMarco 488 Fed. 2d 828; U.S. v. Mapp 476 Fed. 2d 67. A review of the evidence will show that Samual Snow was never a part of any of the conspiracies or the over-all conspiracy. The Court should have set aside the verdict against Samuel Snow. The Court's error in not setting it aside requires that the conviction be reversed.

The Court should have arrested the judgment since the Court lacked jurisdiction in this conspiracy. If the government witness is to be believed at all, the only true conspiracy that was formed was one formed from Brewster, New York, to New York City between Glen Snow, Samuel Snow and Jules Votraw. That conspiracy with the overt act and furtherance of the same took place in the Southern District of New York. Hyde v. U.S. 225 U.S. 347; Ladner v. U.S. 168 Fed. 2d 771;

Pullin v. U.S. 104 Fed. 2d 57; Singer v. U.S. 208 Fed. 2d 477; Bartoli v. U.S. 192 Fed. 2d 130; Smith v. U.S. 92 Fed. 2d 460. A conspiracy case may be laid in the district where the conspiracy was formed or where the overt act or furtherance of the same took place. In searching for the venue of a conspiracy act, the place where the conspiracy was formed appears to be the focal point in setting the venue. A review of the evidence would show that the conversations between Mangor and both Snows could not as a matter of law have been a conspiracy. When did this conspiracy became formed? The only time that the agreement and the meeting of minds could have taken place was on the trip from Brewster to New York City and the overt act of making the trip took place in that district.

The Court should have set aside the verdict due to lack of jurisdiction.

CONCLUSION

The conviction of Samuel Snow should be reversed and his indictment dismissed.

Dated: March 31, 1976

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

SAMUEL SNOW,

Appellant.

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AFFIDAVIT OF SERVICE
BY MAIL

Docket No. 75-CR-82

STATE OF NEW YORK)
) ss.:
COUNTY OF ESSEX)

EVELYN A. HATCH, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at Willsboro, New York. That on the 2nd day of April, 1976, deponent served the within record and brief on appeal upon Thomas P. O'Sullivan, Assistant U.S. Attorney, at U.S. Post Office Building, Albany, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States post office department within the State of New York.

Evelyn A. Hatch
EVELYN A. HATCH

Sworn to before me this
2 day of April, 1976

Florence E. Hathaway
Notary Public

FLORENCE E. HATHAWAY
Notary Public in the State of New York
No. 16-6804117
Qualified in Essex County
My Commission Expires March 30, 1978